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IN THE
COURT OF APPEALS OF INDIANA

LISA J. KANE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 30A04-1109-CR-488
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HANCOCK SUPERIOR COURT
The Honorable Terry K. Snow, Judge
Cause No. 30D01-1012-FD-219

April 27, 2012

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Lisa Kane appeals her conviction for Class D felony Receiving Stolen Property.[1] Kane raises numerous issues which we restate as whether (1) the evidence is sufficient to support her conviction, and (2) the trial court erred in instructing the jury. We affirm.

FACTS AND PROCEDURAL HISTORY

Shirley and Stephen Rifner (the "Rifners") have lived in their rural Hancock County home for approximately twenty-five years and are the parents of three children, the youngest of whom is Sam Rifner. Kane and Sam have been involved in an approximately fifteen-year relationship and have a child together. Kane and Sam lived together until, due to financial difficulties, they were unable to afford their apartment, at which time each moved in with his or her respective parents. Kane did not have a driver's licence and relied on Sam for her transportation needs. Even after moving in with her parents, Kane spent time with Sam, including overnight visits, in the Rifners' home.

At some point after Sam moved back in with his parents, Shirley noticed that her Wii video game system, Wii Fit videogame, and some Wii Fit accessories were missing. Shirley also noticed that some of her husband's tools were missing. Shirley confronted Sam who admitted that he had taken the items and that they had been pawned. Shirley also found a number of receipts from at least two pawn stores in Indianapolis demonstrating that the missing items had indeed been pawned. At least two of the pawn receipts indicated that the items had been pawned by Kane. One of the receipts bore the thumbprint of the person who

[1] Ind. Code § 35-43-4-2(b) (2010).

pawned the property on the back of the ticket, and the thumbprint matched Kane's thumbprint.

On December 8, 2010, the State charged Kane with Class D felony receiving stolen property. On March 7, 2011, the State added the allegation that Kane was a habitual offender. On July 26, 2001, at the conclusion of trial, the jury found Kane guilty of receiving stolen property. Kane subsequently admitted that she was a habitual offender. On August 31, 2011, the trial court sentenced Kane to a five-year term of incarceration with one year suspended to probation. Kane now appeals.

DISCUSSION AND DECISION

Kane contends that the evidence is insufficient to support her conviction for Class D felony receiving stolen property and that the trial court erred in instructing the jury.

I. Sufficiency of the Evidence

Kane claims that the evidence is insufficient to support her conviction for Class D felony receiving stolen property because the record is devoid of evidence that she knew the property in question was stolen.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction.… The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (citations, emphasis, and quotations omitted). "[I]t is for the trier of fact to reject a defendant's version of what happened, to

determine all inferences arising from the evidence, and to decide which witnesses to believe." *Holeton v. State*, 853 N.E.2d 539, 541 (Ind. Ct. App. 2006). Upon review, appellate courts do not reweigh the evidence or assess the credibility of the witnesses. *Stewart v. State*, 768 N.E.2d 433, 435 (Ind. 2002).

Indiana Code section 35-43-4-2(b) provides that "[a] person who knowingly or intentionally receives, retains, or disposes of the property of another person that has been the subject of theft commits receiving stolen property, a Class D felony." In addition to proving the explicit elements of the crime, the State must also prove beyond a reasonable doubt that the person knew that the property was stolen. *Fortson v. State*, 919 N.E.2d 1136, 1139 (Ind. 2010) (citing *Gibson v. State*, 643 N.E.2d 885, 887 (Ind. 1994); Ind. Code § 35–41–2–2(d) ("Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct.")). Knowledge that property is stolen may be inferred from the circumstances surrounding the possession. *Id.* (citing *Stone v. State*, 555 N.E.2d 475, 477 (Ind. 1990)).

"However it has long been the accepted law in this state that the 'surrounding circumstances' must include something more than the mere unexplained possession of recently stolen property." *Id*. "Instead the 'mere possession' rule has been reserved for the charge of the theft." *Id*. "As this Court observed almost a century ago, '[t]he rule that the possession of stolen property, the proceeds of a larceny, soon after the commission of the offense, unless explained, is prima facie evidence of the guilt of the person in whose

possession the property is found, does not apply to the offense of receiving stolen property.'" *Id*. (quoting *Bowers v. State*, 196 Ind. 4, 11, 146 N.E. 818, 820 (1925); *see also Wertheimer v. State*, 201 Ind. 572, 581, 169 N.E. 40, 44 n. 1 (1929) ("Where, as in the case at bar, there is no evidence to show that the theft was committed by some person other than the defendant charged with receiving the goods, such possession of goods recently stolen raises a presumption of theft, rather than of receiving stolen goods, and is not prima facie evidence that the possessor is guilty of receiving stolen goods.")).

We cannot say that the jury improperly inferred that Kane knew that the property in question was stolen. Kane and Sam had engaged in a long-term relationship and were experiencing financial difficulties. Kane was familiar with the Rifners' home and, one could reasonably infer, their belongings. Sam admitted that he had stolen the items and at least two of the pawn receipts indicated that the items had been pawned by Kane. The jury was free to infer from Kane and Sam's close relationship, from Sam's admissions, and from Kane's thumbprint, that Kane was a fully knowledgeable participant in the effort to take and sell the Rifners' property without their permission. As such, we will not disturb the jury's determination that Kane knew the items were indeed stolen. Kane's argument on appeal effectively amounts to an invitation for this court to reweigh the evidence, which we will not do. *See Stewart*, 768 N.E.2d at 435.

II. Jury Instructions

Kane next contends that the trial court abused its discretion in instructing the jury. Specifically, Kane argues that the trial court abused its discretion in refusing to give Defense

Proffered Instruction No. 1, which stated that "Evidence that merely raises a suspicion that the defendant had knowledge that the property is stolen is not sufficient to sustain a conviction for receiving stolen property." Appellant's App. p. 24. Kane also argues that the trial court abused its discretion in giving Final Instruction No. 12, which stated that "You are instructed that when two or more persons combine to commit a crime, each is responsible for the acts of his confederate(s) committed in furtherance of the common design, the act of one being the act of all." Appellant's App. p. 33.

> The purpose of jury instructions is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. In reviewing a trial court's decision to give a tendered jury instruction, we consider (1) whether the instruction correctly states the law, (2) is supported by the evidence in the record, and (3) is not covered in substance by other instructions. The trial court has discretion in instructing the jury, and we will reverse only when the instructions amount to an abuse of discretion. To constitute an abuse of discretion, the instructions given must be erroneous, and the instructions taken as a whole must misstate the law or otherwise mislead the jury. We will consider jury instructions as a whole and in reference to each other, not in isolation.

Munford v. State, 923 N.E.2d 11, 14 (Ind. Ct. App. 2010), (citing *Murray v. State*, 798 N.E.2d 895, 899-900 (Ind. Ct. App. 2003)).

A. Defense Proffered Instruction No. 1

Kane argues that the trial court abused its discretion in refusing to include Defense Proffered Instruction No. 1 in its final instructions to the jury. In making this argument, Kane relies on her argument relating to the allegedly insufficient evidence to prove she knew the property in question was stolen. Upon completing her argument relating to the

sufficiency of the evidence, Kane merely states that "Accordingly, Defendant was entitled to have her tendered instruction number one … to be given and the Court erred in refusing to give said instruction." Appellant's Br. p. 4.

Kane does not present the relevant standard for reviewing questions regarding jury instruction or any separate argument relating to the proffered jury instruction, and fails to cite to any relevant authority which supports her claim. Indiana Appellate Rule 46(A)(8) provides in relevant part, "The argument must contain the contentions of the appellant on the issues presented supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on." A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record. *Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005), *trans. denied*; *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied*. Accordingly, Kane has waived this issue for appellate review.

Waiver notwithstanding, we cannot conclude that the trial court abused its discretion in denying Defense Proffered Instruction No. 1 because each element of the tendered instruction was covered by other instructions given by the court. Again, upon a challenge to the jury instructions given by a trial court, we review the instructions to determine whether the challenged instruction is covered in substance by other instructions and will consider jury instructions as a whole and in reference to each other, not in isolation. *See Munford*, 923 N.E.2d at 14 (citing *Murray*, 798 N.E.2d at 900). Here, the trial court instructed the members of the jury that they could find Kane guilty if they found that she "knowingly, received,

retained or disposed of the property of another person that had been the subject of theft." Tr. p. 185. The trial court further instructed the jury as follows:

> To overcome the presumption of innocence the State must prove the defendant guilty of each essential element of the crime charged beyond a reasonable doubt.… Evidence showing nothing more than possession of recently stolen property is insufficient to show guilt and knowledge.

Tr. pp. 186-89. Accordingly, because we believe that the substance of Defense Proffered Instruction No. 1 was adequately covered by other instructions, we conclude that the trial court acted within its discretion in not including Defense Proffered Instruction No. 1 in its final instructions to the jury.

B. Final Instruction No. 12

Kane also argues that the trial court abused its discretion in including Final Instruction No. 12 in its final instructions to the jury. In making this argument, Kane claims that "there exists no evidence in the record to support such an instruction about two or more persons combining to commit an act." Appellant's Br. p. 8. We disagree.

This court has previously concluded that "[w]here the facts raise a reasonable inference that the crime was carried out with an accomplice, it is appropriate for the trial court to give an accomplice liability instruction." *Fowler v. State*, 900 N.E.2d 770, 774 (Ind. Ct. App. 2009). Again, here, the evidence demonstrates that Kane and Sam were engaged in a long-term relationship, were experiencing mutual financial difficulties, spent time together in the Rifners' home, were similarly familiar with the Rifners' possessions, used the same transportation, and engaged in a common effort to pawn the property in question. From this

evidence, we conclude that the jury could reasonably infer that Kane and Sam acted together to commit their crimes, and as such, conclude that the trial court acted within its discretion in including Final Instruction No. 12 in its final instructions to the jury. *See id*.

Moreover, we acknowledge that the dissent would find that Final Instruction No. 12 on accomplice liability was deficient because it fails to include any reference to (1) the "knowing or intentional" mens rea requirement for accomplice liability, and (2) the requirement that the defendant engaged in voluntary conduct which aided, induced, or caused her accomplice to commit the charged offense. While we agree with the dissent that Final Instruction No. 12 was deficient, we note that Kane did not challenge Final Instruction No. 12 on this ground either below or on appeal. As such, we conclude that any challenge to the deficient nature of Final Instruction No. 12, as given, is waived. *See generally*, *Ingram v. State*, 547 N.E.2d 823, 829 (Ind. 1989) (providing that a defendant may not state one reason for an objection at trial and then rely on another on appeal, and any grounds not raised in the trial court are not available on appeal).

The judgment of the trial court is affirmed.

KIRSCH, J., concurs.

BARNES, J, dissents with opinion.

IN THE
COURT OF APPEALS OF INDIANA

LISA J. KANE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 30A04-1109-CR-488
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

BARNES, Judge, dissenting with separate opinion

I respectfully dissent. Although there may be legally sufficient evidence to support the jury's verdict that Kane committed receiving stolen property, my faith in that verdict is lessened because of what I believe to be instructional error.[2]

As noted by the majority, the jury was instructed "that when two or more persons combine to commit a crime, each is responsible for the acts of his confederate(s) committed in furtherance of the common design, the act of one being the act of all." App. p. 33. Assuming this was intended to be an instruction on accomplice liability, on the theory that Kane assisted Sam in his theft of his parents' property, it is outdated and woefully

[2] The majority asserts that Kane has waived any claim of instructional error for failure to make a cogent argument. I believe Kane's argument is sufficient to permit appellate review.

inadequate. The majority certainly is correct that a person may be charged as a principal yet convicted as an accomplice. The language in this jury instruction, however, dates from a 1978 case, Harrison v. State, 269 Ind. 677, 687, 382 N.E.2d 920, 926 (1978), cert. denied, and it is only the first sentence in a much longer instruction on the defense of abandonment. The quoted sentence that was given to the jury here was never meant to be a complete instruction on accomplice liability.

Following the trial at issue Harrison, Indiana codified the law on accomplice liability to provide that "[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense . . . ." Ind. Code § 35-41-2-4. The jury instruction here makes no mention of the "knowingly or intentionally" mens rea requirement for accomplice liability. That is a glaring omission in my view, especially given that evidence of Kane's knowledge that she was helping Sam "fence" stolen property is far from overwhelming.

Moreover, any instruction on accomplice liability must convey to the jury that the defendant had to have engaged in voluntary conduct in concert with his or her accomplice. Boney v. State, 880 N.E.2d 279, 293 (Ind. Ct. App. 2008), trans. denied. In Small v. State, 531 N.E.2d 498 (Ind. 1988), our supreme court addressed a case in which the only instruction given on accomplice liability read:

> Indiana law provides that: A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense. It is also the law that a Defendant is responsible for the acts of his codefendants as well as his own acts. Any act of one is attributable to them all.

Small, 531 N.E.2d at 499. The Small court held that giving this instruction was reversible error because it would have permitted the defendant to be found guilty for a compatriot's conduct without regard to whether the conduct occurred while the defendant was acting in concert in carrying out the agreed-upon crime. Id.

The jury instruction here is very similar to the one disapproved of in Small. In fact, it is even less adequate, because it lacks any mention of the required mens rea for accomplice liability. If the State had wanted a jury instruction on accomplice liability, it could have tendered one based on Indiana Criminal Pattern Jury Instruction 2.11, which tracks the language of the accomplice liability statute. I also cannot conclude that the giving of this instruction was harmless, given that I believe this case was a very "close call" on the question of Kane's guilt. I vote to reverse Kane's conviction.